Filed 6/25/19 P. v. Williams CA3
Opinion after prior opinion filed 6/24/19 vacated

NOT TO BE PUBLISHED

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

THIRD APPELLATE DISTRICT

(Sacramento)

THE PEOPLE, Plaintiff and Appellant, v. MICHAEL LEON WILLIAMS et al., Defendants and Appellants.	C080504 (Super. Ct. No. 13F00241)

Following a jury trial, defendant A.V. was convicted of three counts of robbery (Pen. Code, § 211)[1] with an enhancement for personally using a firearm (§ 12022.53, subd. (b)), single counts of receiving stolen property (§ 496d, subd. (a)), and second degree murder (§ 187, subd. (a)), with a gang enhancement (§ 186.22, subd. (b)(1)) and an enhancement for being a principal armed with a firearm (§ 12022, subd. (a)(1)).

[1] Undesignated statutory references are to the Penal Code.

Codefendant Michael Leon Williams (Williams) was convicted of receiving stolen property (§ 496d, subd. (a)), assault with a deadly weapon (§ 245, subd. (a)(1)) with a gang enhancement (§186.22, subd. (b)(1)), and first degree murder (§ 187, subd. (a)) with a gang enhancement and enhancements for personally using a firearm (§ 12022.53, subd. (b)) and personally discharging a firearm causing death (§ 12022.53, subds. (d), (c)). The trial court imposed state prison terms of 23 years eight months plus 15 years to life on A.V. and 40 years to life on Williams.

On appeal, A.V. contends: (1) there is insufficient evidence to support the gang enhancement; (2) the gang enhancement and murder conviction were based on inadmissible hearsay; (3) his convictions must be conditionally reversed and the matter remanded for a juvenile fitness hearing; and (4) there is an error in the abstract. In a supplemental brief, he contends the matter should be remanded to allow the trial court to determine whether to exercise its new discretion to strike the section 12022.53 firearm enhancement. In a second supplemental brief, he contends the matter must be transferred to the juvenile court in light of Senate Bill No. 1391 (2017-2018 Reg. Sess.) (SB 1391), and his murder conviction must be reversed in light of Senate Bill No. 1437 (2017-2018 Reg. Sess.) (SB 1437).

Williams contends the trial court: (1) prejudicially erred in excluding testimony from his sisters; (2) the gang allegations were based on inadmissible hearsay; and (3) he is entitled to a remand for a juvenile fitness hearing. In a supplemental brief, he contends the matter should be remanded to allow the trial court to determine whether to exercise its new discretion to strike the firearm enhancements.

The Attorney General contends in a cross-appeal that the trial court imposed an unauthorized sentence when it reduced the sentence for the firearm enhancement on Williams' murder conviction from 25 years to life to 15 years to life.

There is insufficient evidence of a connection between the parent and the subset gang so the gang enhancement for both defendants must be reversed. Substantial

evidence supports A.V.'s second degree murder conviction. Any relief from this conviction under SB 1437 must be obtained pursuant to the petition procedure established under section 1170.95. Any error in admitting hearsay gang evidence was harmless. The trial court did not err in declining to admit the testimony from Williams' sisters. Pursuant to SB 1391, A.V.'s sentence is vacated, the convictions deemed juvenile adjudications, and the matter transferred for proceedings in the juvenile court. Williams is entitled to a conditional reversal and remand for a juvenile fitness hearing. If the juvenile court determines Williams is fit to be tried as an adult, then the trial court must determine whether to exercise its discretion to strike the gun enhancements.

I. BACKGROUND

A. Possession of Stolen Property

A white Toyota minivan was stolen on January 4, 2013. Williams was seen driving the van on January 16, 2013. When the minivan was recovered the next day, Williams' fingerprint was found on the false license plate and A.V.'s fingerprint was found around a damaged headlamp.

B. The Robberies

On January 12, 2013, 13-year-old O.B., Harold, and Christian were on their way to the store when A.V. and another person came up behind them. A.V. pulled out a semiautomatic pistol and said, " 'Give me what you've got.' " A.V. and his accomplice took a variety of items from their victims, including phones, an iPod nano, ear buds, Chapstick, and rosary beads.

C. The Assault

On January 16, 2013, a loss prevention manager at Saks Fifth Avenue at the Folsom Outlet Stores ran after two shoplifting suspects, who went to a white van. Williams was standing by the van. He got into the driver's seat and drove the van, which hit the manager, causing the manager to suffer bruising on his left side.

D. The Murder

Anthony N. was shot and killed on 39th Street in Sacramento on January 17, 2013, sustaining a fatal wound to the torso and two gunshot wounds to the legs.

Sergio was good friends with Anthony N. and knew him since 2010 or 2011. Sergio was a member of the Fruitridge Vista Norteño gang. Anthony N. was not a "hard core" gang member, but claimed the G Parkway gang.

About a week before the killing, Anthony N. and Williams had an altercation at the First Community Center during which Williams pulled a gun. Sergio had told the police that Williams did not have a gun.

On the day of the killing, Sergio and Anthony N. were driving in Sergio's green Mazda from Tahoe Park to Anthony N.'s house when they saw both defendants outside a market near a white minivan. Defendants threw up gang signs as Sergio and Anthony N. drove past. A.V. said "FRK," which means Fruitridge Killers. This was a threatening and derogatory term to Sergio because his gang was the Fruitridge Vista Norteños. Anthony N. responded by yelling "G Parkway" or "fuck you[,] G Parkway." Sergio may have responded by saying "Fruitridge." His car window was barely cracked open at the time.

The defendants followed Sergio in their white minivan as he kept driving. Sergio wanted the defendants to follow him, and he and Anthony N. planned to fight them when they did. Anthony N. told Sergio to pull over to "catch a fade," or engage in a fistfight without weapons. Sergio agreed, as he wanted to engage in a fistfight as a result of their having been disrespected.

After Sergio pulled over, Anthony N. got out of the car while the white minivan pulled up and stopped by the side of Sergio's car. Anthony N. said nothing; he did not have a gun. Sergio saw Williams flash a gun. As he began driving away, Sergio heard six to seven gunshots within seconds of seeing the firearm.

Sergio drove around the neighborhood, returning to the scene after he saw the defendants' minivan leave. Anthony N. was on the ground with gunshot wounds to his chest and legs.

Jenice was walking to Target with a friend at the time of the shooting. She saw the white minivan and a person standing outside it. Jenice heard gunshots and saw a male fall backwards. The person who fell did not have a gun. As the minivan drove past, she made eye contact with the occupants, who appeared to be calm and relaxed. She called 911.

Anne and Amy lived in the neighborhood where the incident happened. They heard eight to 10 gun shots, with the first three paced in time and the remainder more rapidly fired. Two vehicles came around the corner from 39th Street to 7th Avenue, a green sedan and a white minivan. The green sedan drove down 7th Street, made a U-turn, and returned, while the minivan drove off in the opposite direction. The occupant of the green sedan got out of his vehicle and ran to the shooting victim, who lay on the sidewalk across the street. The man said his cousin was shot. Anne saw no gun by either of the men.

Sacramento Police Officer Jay Miller arrived at the scene at 12:45 p.m. Anthony N. was lying on his back on the sidewalk at 39th Street. He had labored breathing and was not talking. Sergio paced around the scene, throwing his car keys, and saying the victim was his cousin. Sergio drove away when he was told to back his vehicle to the side of the road.

About an hour later, Sergio drove by the scene with two other people in the green Mazda sedan. He was pulled over and detained by the police. The car was towed, and a subsequent search found no firearms.

Sergio subsequently told detectives that Williams was involved in the shooting. In an interview with police, Williams confirmed he had a Facebook page under the name

"Moneey Mike" in which he made the post, "I'm popping shots for my bros cuz my bros gonna pop for me. You rocking nigga know a real nigga out."

Williams told the detectives that he and A.V. were at the market when Sergio and Anthony N. came by and started "banging." Both defendants followed them in the van; Williams had a 9-millimeter Beretta on his lap. When the cars stopped, Anthony N. and Sergio got out of their car. Sergio and Anthony N. drew guns on him and were going to kill him. Afraid he was going to die, Williams pulled out his gun and fired nine times. Sergio then picked up Anthony N.'s gun and left. After defendants drove off, Williams disposed of his gun.

E. Gang Evidence

Sacramento Police Detective Shannon Richardson testified as an expert on street gangs. The primary Hispanic gangs in South Sacramento were the Norteños and Sureños, with the Norteños predominating. The primary activities of the Norteños gang included robberies, attempted homicide, homicide, assault with a deadly weapon, narcotics violations, and burglaries. Subsets of the Norteños in South Sacramento included the Varrio Franklin Norteños, the Fruitridge Vista Norteños, the Varrio Diamond Norteños, the Valley High Norteños, the Meadowview Norteños, and the Gardons. Fruitridge and Franklin, or Franklon, are rival Norteño subsets in the South Sacramento area.

Testifying regarding predicate offenses involving Norteño gang members, Detective Richardson was familiar with a case involving Andrew Martin and Christopher Shultz. Martin and Shultz were Varrio Diamond gang members who encountered members of a rival gang. Martin asked one of them where he was from and told him this was Diamonds territory. Martin then shot the rival gang member in the abdomen, and later pleaded to attempted voluntary manslaughter with a gang enhancement.

Detective Richardson was also familiar with a case involving the Norteño gang member Keeyon Neal. Neal was contacted several times while associating with Valley

High Norteños. He shot at several victims, including a Sureño dropout who had recognized Neal from Valley High. Neal was convicted of assault with a firearm with a gang enhancement.

Detective Richardson also used the current offenses in this case as predicates to establish the Norteños as a criminal street gang.

Shown a photograph of A.V. with a tattoo of "Teresa over the top of 916 vertically down the arm in very large lettering," Detective Richardson opined that the 916 in the tattoo was a reference to the area code for the Sacramento area, a predominately Norteño territory. A.V. also had "loyalty" tattooed on his left forearm, which was a very common gang tattoo.

Detective Richardson also described an incident in which another officer, Officer Johnson, witnessed A.V. repeatedly yelling at a person and calling him a snitch. Officer Johnson also saw A.V. write gang terms on one of his binders. Detective Richardson also related a report which described A.V. drawing gang graffiti inside a holding cell. A.V., who went by the nickname "Ant," wrote "Ant mob murda gang" and "free the team FRK Ant mob." The term "FRK" meant "Fruitridge killer," a reference to the Fruitridge gang, a Norteño gang rival to some other Norteño gangs, including the Franklon gang. The graffiti references to "murda gang" meant murder and gang.

Reviewing photographs other law enforcement agencies pulled from Facebook and Instagram, Detective Richardson found a photograph of A.V. wearing a Chicago Bulls hat and making a bulls sign with his hands. Bulls represented the term "boulevard," for Franklin Boulevard, and red was the color Norteños wore to represent their allegiance to the Norteño gang. Other Norteño members were depicted in photographs, flashing gang signs and money.

Detective Richardson had an opinion on whether A.V. was a Norteño but did not state what the opinion was. She believed Williams was associated with the Norteños. Williams had a Facebook message stating, " 'I'm popping shots for my brothers 'cause

my brothers gone popping for me.' " This meant that Williams was willing to shoot for his fellow gang members because they were willing to shoot for him.

On April 16, 2010, A.V. admitted to a school resource officer that he was a Norteño gang member who had been "jumped in" about a year before. A.V. had written "Fuck a scrap" on his desk and gang graffiti stating "Sureño or scrap killer" on his binder.

II. DISCUSSION

A. Proposition 57 and Senate Bill 1391

Both defendants in this case are juveniles tried as adults. At the time of their offenses, A.V. was 15 and Williams was 16.

The Welfare and Institutions Code formerly allowed the prosecution to file a criminal case against a minor in criminal court in some circumstances without first filing a petition in the juvenile court. (Welf. & Inst. Code, former § 707, subd. (d)(1)-(2), Stats. 2008, ch. 179, § 236, p. 907.) But in November 2016, the voters approved Proposition 57, which amended Welfare and Institutions Code section 707 to require that any allegation of criminal conduct against any person under 18 years of age be commenced in juvenile court, regardless of the age of the juvenile or the severity of the offense. (Voter Information Guide, Gen. Elec. (Nov. 8, 2016) text of Prop. 57, pp. 141-145.) The prosecutor may file a motion to transfer the case from juvenile court to criminal court, in which case the juvenile court must consider specified criteria to determine whether transfer is appropriate. (Welf. & Inst. Code, § 707, subd. (a)(1), (3)(A)-(E).)

Further, during the pendency of this appeal, SB 1391 was enacted, which amended Welfare and Institutions Code section 707, subdivision (a) to read: "In any case in which a minor is alleged to be a person described in [Welfare and Institutions code] Section 602 by reason of the violation, when he or she was 16 years of age or older, of any offense listed in subdivision (b) or any other felony criminal statute, the district attorney or other appropriate prosecuting officer may make a motion to transfer the minor from juvenile

court to a court of criminal jurisdiction." (Sen. Bill No. 1391 (2017-2018 Reg. Sess.) § 1; Stats. 2018, ch. 1012, § 1.) SB 1391 repealed the prosecutor's authority to transfer a minor from the juvenile court to the criminal court when the minor was 14 or 15 years old at the time of the offense, save a narrow exception when the minor is "not apprehended prior to the end of juvenile court jurisdiction." (Welf. & Inst. Code, § 707, subd. (a)(2); *People v. Superior Court (Alexander C.)* (2019) 34 Cal.App.5th 994, 998.) Because SB 1391 was enacted as nonurgency legislation during the 2018 regular session, it became effective on January 1, 2019. (Cal. Const., art. IV, § 8; Gov. Code, § 9600, subd. (a); *People v. Camba* (1996) 50 Cal.App.4th 857, 865.)

Both defendants claim they are entitled to retroactive application of Proposition 57. In his second supplemental brief, A.V. contends he is entitled to the benefit of SB 1391.

Under the rationale of *In re Estrada* (1965) 63 Cal.2d 740, we must presume, absent contrary evidence, the Legislature intends amendments to statutes that reduce the punishment for a crime to apply to defendants in all cases in which the sentence is not yet final on the date the statute takes effect. (*People v. Brown* (2012) 54 Cal.4th 314, 323.) In a case decided while this appeal was pending, the California Supreme Court held this rationale applies to a defendant under the age of 18 who was charged in adult court prior to the effective date of Proposition 57. (*People v. Superior Court* (*Lara*) (2018) 4 Cal.5th 299, 303 (*Lara*).) By the same logic, SB 1391 applies retroactively as well.

Since A.V. was under the age of 16 when he committed his crimes, SB 1391 vests jurisdiction exclusively in the juvenile court. We shall therefore vacate his sentence, deem his convictions juvenile proceedings, and transfer the matter to juvenile court.[2] Williams, however, was 16 when he committed his crimes, so transfer to adult court is

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[2] As A.V.'s sentence is vacated and the matter transferred to juvenile court, we decline to address his now moot claim that there was an error in the abstract of judgment.

still possible. For cases pending in criminal court when Proposition 57 was approved by the voters, the court in *Lara* approved the procedure implemented by the court in *People v. Vela* (2017) 11 Cal.App.5th 68. Under that procedure, a defendant is entitled to a transfer hearing in juvenile court to determine whether the case should proceed through the juvenile justice system or be transferred back to criminal court. (*Lara*, *supra*, 4 Cal.5th at p. 310.) Consistent with that approach, we must conditionally vacate Williams' conviction and send the matter to the juvenile court for a transfer hearing. (Welf. & Inst. Code, § 707.)

If, after considering the matter of Williams, the juvenile court determines it would have transferred the matter to the criminal court, then the matter will be transferred to criminal court and the conviction and sentence (as modified by this decision) will be reinstated. (Welf. & Inst. Code, § 707.1, subd. (a).) Alternatively, if the juvenile court determines it would not have transferred the matter to the criminal court, it will treat the conviction of Williams as a juvenile adjudication, enter appropriate findings consistent with Welfare and Institution Code section 702 (Welf. & Inst. Code, §§ 602 [defining ward], 702 [wardship determination]), and impose an appropriate disposition after a dispositional hearing. (Welf. & Inst. Code, § 706.)

B. Gang Enhancements

A.V. (with Williams joining) contends insufficient evidence supports the jury's finding that defendant committed his crimes for the benefit of a street gang. (§ 186.22, subd. (b)(1).) Relying on *People v. Prunty* (2015) 62 Cal.4th 59 (*Prunty*), A.V. argues the prosecution, through Detective Richardson's testimony of the predicate crimes, failed to prove an associational or organizational connection between the Norteño subset to which defendant belonged and the subsets that committed the predicate offenses Detective Richardson introduced to establish the existence of the gang. He also argues the gang expert testimony failed to establish an associational or organizational connection linking the subsets to the greater Norteño gang. He contends the lack of evidence

requires us to reverse the gang enhancement findings. The Attorney General concedes the point. We agree.

"Section 186.22, subdivision (b)(1), increases punishment for 'any person who is convicted of a felony committed for the benefit of, at the direction of, or in association with any criminal street gang, with the specific intent to promote, further, or assist in any criminal conduct by gang members.'

" 'To establish that a group is a criminal street gang within the meaning of the statute, the People must prove: (1) the group is an ongoing association of three or more persons sharing a common name, identifying sign, or symbol; (2) one of the group's primary activities is the commission of one or more statutorily enumerated criminal offenses; and (3) the group's members must engage in, or have engaged in, a pattern of criminal gang activity. [Citations.]' [Citations.] 'A "pattern of criminal gang activity" is defined as gang members' individual or collective "commission of, attempted commission of, conspiracy to commit, or solicitation of, sustained juvenile petition for, or conviction of two or more" enumerated "predicate offenses" during a statutorily defined time period. [Citations.] The predicate offenses must have been committed on separate occasions, or by two or more persons.' " (*People v. Cornejo* (2016) 3 Cal.App.5th 36, 47.)

The prosecution sought to establish that defendants were members of the larger Norteño gang by means of their membership in the Franklon Norteño subset. This approach triggered additional burdens of proof and requires, generally, that the subset be connected with the larger group. (*Prunty, supra,* 62 Cal.4th at pp. 71-72.) Here, the prosecution did what our Supreme Court said was not permissible: It introduced evidence through Detective Richardson of different subsets' conduct to establish the primary activities and predicate offense requirements, but it did not demonstrate that the subsets were connected to defendants' subset or to a larger Norteño group.

We accept the Attorney General's concession, and applying *Prunty*, we reverse both defendants' gang enhancements.

C. Firearm Enhancements

In supplemental briefs, both defendants claim the matter must be remanded to allow the trial court to determine whether to strike the section 12022.53 enhancements. We agree.

On October 11, 2017, the Governor signed Senate Bill No. 620 (Stats. 2017, ch. 682, § 2, eff. Jan. 1, 2018) (SB 620). As relevant here, SB 620 provides that, effective January 1, 2018, section 12022.53 is amended to permit the trial court to strike an enhancement for personally using (§ 12022.53, subd. (b)) or personally and intentionally discharging (*id*., at subd. (c)) a firearm. The new provision states as follows: "The court may, in the interest of justice pursuant to Section 1385 and at the time of sentencing, strike or dismiss an enhancement otherwise required to be imposed by this section. The authority provided by this subdivision applies to any resentencing that may occur pursuant to any other law." (§ 12022.53, subd. (h).) Prior to this amendment, an enhancement under section 12022.53 was mandatory and could not be stricken in the interests of justice. (See former § 12022.53, subd. (h), Stats. 2010, ch. 711, § 5; *People v. Felix* (2003) 108 Cal.App.4th 994, 999.)

The amendment to section 12022.53 applies retroactively to cases not final on appeal. (*People v. Arredondo* (2018) 21 Cal.App.5th 493, 507; *People v. Woods* (2018) 19 Cal.App.5th 1080, 1090-1091.) When a trial court is unaware of sentencing discretion, the appropriate remedy is to remand for the court to exercise its discretion. (*People v. Brown* (2007) 147 Cal.App.4th 1213, 1228.) In the case of SB 620, a remand is required unless the record shows that the trial court clearly indicated when it originally sentenced the defendant, that it would not in any event have stricken a firearm enhancement. (*People v. McDaniels* (2018) 22 Cal.App.5th 420, 427-428.) As there is no such showing here, the juvenile court in A.V.'s case, and, depending on the juvenile

court's finding regarding transfer, either the juvenile court or trial court in Williams' case, shall determine whether to exercise its discretion to strike any of the section 12022.53 enhancements.

D. Case-Specific Hearsay

A.V. contends his murder conviction must be reversed because the trial court erred in allowing Detective Richardson to testify to case-specific hearsay, in violation of *People v. Sanchez* (2016) 63 Cal.4th 665 (*Sanchez*).[3] We disagree.

Under *Sanchez*, "[w]hen any expert relates to the jury case-specific out-of-court statements, and treats the content of those statements as true and accurate to support the expert's opinion, the statements are hearsay." (*Sanchez, supra*, 63 Cal.4th at p. 686.) As such, the statements are only admissible if they either fall under a hearsay exception or are independently proven. (*Ibid*.) "Case-specific facts are those relating to the particular events and participants alleged to have been involved in the case being tried." (*Id.* at p. 676.) If the hearsay involves testimonial statements, then, under *Crawford v. Washington* (2004) 541 U.S. 36 [158 L.Ed.2d 177] any error is subject to the harmless beyond a reasonable doubt standard for constitutional errors. (*Sanchez, supra*, at pp. 670-671.)

A.V. asserts that Detective Richardson gave case-specific testimony when testifying about the predicate offenses, about which she had no first-hand knowledge and relied solely on testimonial hearsay. He additionally claims the testimony regarding A.V.'s tattoos was hearsay, as Detective Richardson had never seen or met defendant, or seen his tattoos, but instead identified the tattoos from photographs purportedly taken of A.V. A.V. also makes this claim regarding Detective Richardson's testimony regarding the graffiti in A.V.'s cell, noting that Detective Richardson never saw the contents of his

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[3] Both defendants make *Sanchez* based attacks on their gang enhancements that we decline to address since we reverse the enhancements under *Prunty*.

cell. According to A.V., this prejudiced him regarding his murder conviction because the testimony linking A.V. and Williams to the gang "poisoned the well" as to the question the jury had to decide regarding the murder charge—what were the natural and probable consequences of A.V.'s conduct.[4] A.V. finds the "inadmissible gang evidence made it more likely that the jury found that murder and attempted murder were natural and probable consequences of lesser crimes" he was "alleged to have intended."

We need not address whether A.V.'s claim is forfeited for failure to object (see *People v. Meraz* (2016) 6 Cal.App.5th 1162, 1170, fn. 7, review granted Mar. 22, 2017, S239442 ["Any objection would likely have been futile because the trial court was bound to follow pre-*Sanchez* decisions holding expert "basis" evidence does not violate the confrontation clause"]; *People v. Blessett* (2018) 22 Cal.App.5th 903, 925-926 [failure to raise objection before *Sanchez* was decided forfeits *Sanchez* claim]) because any error under *Sanchez* is harmless beyond a reasonable doubt.

There is overwhelming nonhearsay evidence that A.V. was in a gang that was a rival to Sergio's. The jury heard testimony from a school resource officer that A.V. admitted being a Norteño gang member and had written gang graffiti on his desk and binder. Sergio testified that he was a member of the Fruitridge Vista Norteño gang, that A.V. and Williams made gang signs when he and Anthony N. drove past them, that his gang was a rival of the Franklon gang, and that A.V. may have made a comment a Franklon member would make against a member of Sergio's gang.

Contrary to A.V.'s claim, the tattoo evidence was not inadmissible hearsay. "Photographs and videotapes are demonstrative evidence, depicting what the camera sees. [Citations.] They are not testimonial and they are not hearsay, that is, 'evidence of a statement that was made other than by a witness while testifying at the hearing and that

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[4] The jury was instructed on aider and abettor liability for A.V. under the natural and probable consequences doctrine.

is offered to prove the truth of the matter stated. . . .' [Citation.] Thus, the confrontation clause does not preclude the[ir] admission . . . ." (*People v. Cooper* (2007) 148 Cal.App.4th 731, 746.) The photographs of A.V.'s gang tattoos and the photograph from Instagram of him making a Franklon sign and wearing Norteño colors is further nonhearsay evidence of his gang affiliation.

In addition to the admissible gang evidence, several eyewitnesses confirm Sergio's version of the events after the initial confrontation with defendants. Defendants were in the white minivan that followed Sergio's car. When Sergio stopped, and Anthony N. got outside of the vehicle, defendants' white minivan stopped nearby and an occupant, Williams, fired numerous shots at Anthony N., striking him three times with one fatal wound.[5] In addition, Williams admitted to police that a gun was on his lap when he was driving with A.V.

In light of this evidence, any error in admitting the predicate offense and the testimony on graffiti in the jail cell is harmless beyond a reasonable doubt.

E. Felony Murder Rule

A.V. contends in his second supplemental brief that his murder conviction must be reversed pursuant to changes in the felony murder rule enacted pursuant to SB 1437.

During the pendency of this appeal, SB 1437 was signed into law. SB 1437 was enacted to "amend the felony murder rule and the natural and probable consequences doctrine, as it relates to murder, to ensure that murder liability is not imposed on a person who is not the actual killer, did not act with the intent to kill, or was not a major participant in the underlying felony who acted with reckless indifference to human life." (Stats. 2018, ch. 1015, § 1, subd. (f).) SB 1437 accomplishes this by amending section

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[5] Eight shell casings were found near the murder scene.

188, which defines malice, and section 189, which defines the degrees of murder and addresses liability for murder.

SB 1437 made two major additions to sections 188 and 189. Subdivision (a)(3) was added to section 188 and reads as follows: "Except as stated in subdivision (e) of Section 189, in order to be convicted of murder, a principal in a crime shall act with malice aforethought. Malice shall not be imputed to a person based solely on his or her participation in a crime."

SB 1437 also added subdivision (e) to section 189, which states: "A participant in the perpetration or attempted perpetration of a felony listed in subdivision (a) in which a death occurs is liable for murder only if one of the following is proven: [¶] (1) The person was the actual killer. [¶] (2) The person was not the actual killer, but, with the intent to kill, aided, abetted, counseled, commanded, induced, solicited, requested, or assisted the actual killer in the commission of murder in the first degree. [¶] (3) The person was a major participant in the underlying felony and acted with reckless indifference to human life, as described in subdivision (d) of Section 190.2."

A.V. asserts SB 1437 applies retroactively to his case because it reduces the punishment for crime and his case is not final. Since he was prosecuted under, and the jury was instructed with, the natural and probable consequences theory of guilt for murder, defendant concludes SB 1437 applies to him and we should reverse his murder conviction.

As with other enactments that have reduced penalties for crimes (see §§ 1170.18 [resentencing under Proposition 47], 1170.126 [resentencing under Proposition 36]), SB 1437 contains a provision for addressing claims of defendants who were convicted of murder prior to its effective date. SB 1437 also enacted section 1170.95, which permits defendants "convicted of felony murder or murder under a natural and probable consequences theory [to] file a petition with the court that sentenced the petitioner to have the petitioner's murder conviction vacated and to be resentenced on any remaining

counts . . . ." (§ 1170.95, subd. (a).) Like the resentencing provisions of Propositions 36 and 47, section 1170.95 provides a detailed mechanism for obtaining by petition.

A person may file a section 1170.95 petition if: "(1) A complaint, information, or indictment was filed against the petitioner that allowed the prosecution to proceed under a theory of felony murder or murder under the natural and probable consequences doctrine[;] [¶] (2) The petitioner was convicted of first degree or second degree murder following a trial or accepted a plea offer in lieu of a trial at which the petitioner could be convicted for first degree or second degree murder[;] [¶] [and] (3) The petitioner could not be convicted of first or second degree murder because of changes to Section 188 or 189 made effective January 1, 2019." (§ 1170.95, subd. (a)(1)-(3).)

"The petition shall be filed with the court that sentenced the petitioner and served by the petitioner on the district attorney, or on the agency that prosecuted the petitioner, and on the attorney who represented the petitioner in the trial court or on the public defender of the county where the petitioner was convicted. If the judge that originally sentenced the petitioner is not available to resentence the petitioner, the presiding judge shall designate another judge to rule on the petition." (§ 1170.95, subd. (b)(1).)

The court then reviews the petition for a prima facie case, and will appoint counsel for petitioner if requested. (§ 1170.95, subd. (c).) The prosecuting agency has 60 days to file an answer to the petition, and petitioner has 30 days to file a reply, with time extensions permitted for good cause. (*Ibid*.) If the court finds the petition establishes a prima facie case, then it shall issue an order to show cause. (*Ibid.*) The court then has 60 days to hold a hearing on the petition, at which the prosecution must prove beyond a reasonable doubt that petitioner is ineligible for sentencing, unless there was a prior finding that the petitioner did not act with reckless indifference to human life or was not a major participant in the felony, in which case the murder conviction and any enhancements are vacated. (§ 1170.95, subd. (d)(1)-(3).) If the petitioner is entitled to relief, the murder conviction and any enhancements will be vacated, and, if "murder was

charged generically, and the target offense was not charged, the petitioner's conviction shall be redesignated as the target offense or underlying felony for resentencing purposes." (§ 1170.95, subd. (e).)

Since SB 1437 reduces the penalty for criminal conduct and A.V.'s conviction is not yet final, it applies to his murder conviction, a point the Attorney General correctly concedes. Whether we can determine if A.V. is entitled to relief is another matter.

In *People v. Martinez* (2019) 31 Cal.App.5th 719 (*Martinez*), Division Five of the Second District Court of Appeal found a defendant must file a section 1170.95 petition in the trial court to obtain relief under SB 1437. (*Martinez, supra.* at pp. 729-730.) Relying on California Supreme Court decisions finding the resentencing provisions of Propositions 36 and 47 were the sole avenues for relief under those provisions (see generally *People v. Conley* (2016) 63 Cal.4th 646 (*Conley*) [Proposition 36]; *People v DeHoyos* (2018) 4 Cal.5th 594 (*DeHoyos*) [Proposition 47]), the court of appeal found section 1170.95 similarly limited relief under SB 1437. (*Martinez, supra*, at pp. 725-728.) We agree with *Martinez*.

In *Conley*, the Supreme Court held the resentencing provision for Proposition 36, section 1170.126, was the sole means by which a person sentenced before Proposition 36 took effect could obtain relief. (*Conley, supra*, 63 Cal.4th at pp. 661-662.) The Supreme Court noted that Proposition 36 addressed the question of retroactivity through section 1170.126, which did not distinguish between those serving final sentences and those whose sentences were not yet final. (*Conley, supra*, at p. 657.) Resentencing was not automatic under section 1170.126 but could be denied if certain disqualifying factors were present or if the resentencing posed an unreasonable risk of danger to public safety. (*Conley, supra,* at pp. 658, 659.) Whether such exclusions applied required findings that typically would not be made at the trial that led to the defendant's conviction. (*Id*. at pp. 659-660.) "In short, application of the Reform Act's revised sentencing scheme would not be so simple as mechanically substituting a second strike sentence for a

previously imposed indeterminate life term." (*Id*. at p. 660.) From this, the Supreme Court concluded that the voters intended for section 1170.126 to be the sole means of relief for defendants sentenced before Proposition 36 took effect. (*Conley, supra,* at p. 661.)

The same result applied to the resentencing provision of Proposition 47, section 1170.18, in *DeHoyos*. "Similar considerations lead us to a similar conclusion in this case. Like the Reform Act, Proposition 47 is an ameliorative criminal law measure that is 'not silent on the question of retroactivity,' but instead contains a detailed set of provisions designed to extend the statute's benefits retroactively. [Citation.] Those provisions include, as relevant here, a recall and resentencing mechanism for individuals who were 'serving a sentence' for a covered offense as of Proposition 47's effective date. [Citation.] Like the parallel resentencing provision of the Reform Act, section 1170.18 draws no express distinction between persons serving final sentences and those serving nonfinal sentences, instead entitling both categories of prisoners to petition courts for recall of sentence. [Citation.] And like the resentencing provision of the Reform Act, section 1170.18 expressly makes resentencing dependent on a court's assessment of the likelihood that a defendant's early release will pose a risk to public safety, undermining the idea that voters 'categorically determined that "imposition of a lesser punishment" will in all cases "sufficiently serve the public interest." ' [Citations.]" (*DeHoyos, supra*, 4 Cal.5th at p. 603.)

A.V. argues *Conley* and *DeHoyos* are inapposite, as the section 1170.95 procedure does not contain any disqualifying factors or a future dangerousness determination. While section 1170.95 contains no such provisions, it is nonetheless analogous to sections 1170.18 and 1170.126. "Like Propositions 36 and 47, Senate Bill 1437 is not silent on the question of retroactivity. Rather, it provides retroactivity rules in section 1170.95." (*Martinez, supra*, 31 Cal.App.5th at p. 727.) We also agree with *Martinez* that neither *Conley* nor *DeHoyos* was contingent on the future dangerousness provisions of

sections 1170.18 and 1170.126. (See *Martinez, supra,* at p. 728.) *Conley* noted that the "cases do not 'dictate to legislative drafters the forms in which laws must be written' to express an intent to modify or limit the retroactive effect of an ameliorative change; rather, they require 'that the Legislature demonstrate its intention with sufficient clarity that a reviewing court can discern and effectuate it.' [Citations.]" (*Conley, supra,* 63 Cal.4th at pp. 656-657.) Likewise, the Supreme Court has elsewhere explained that in *Conley,* "because the legislation contained its own retroactivity provision, we did not apply *Estrada's* different kind of retroactivity." (*Lara, supra,* 4 Cal.5th at p. 312.)

Section 1170.95 does not mechanically apply to every petitioner who makes a prima facie case of eligibility for relief. Rather, such a finding affords the People the opportunity to prove the petitioner's ineligibility beyond a reasonable doubt at a hearing on the petition. At that hearing, "[t]he prosecutor and the petitioner may rely on the record of conviction or offer new or additional evidence to meet their respective burdens." (§ 1170.95, subd. (d)(3).) Appellate courts are not the proper venue for holding hearings where new evidence is taken and factual findings are made. (See *Crofoot Lumber, Inc. v. Lewis* (1962) 210 Cal.App.2d 678, 681 ["The reluctance of appellate courts to take evidence stems in part from the fact that they are not equipped for any appreciable foray into this field"].) Knowing this, the Legislature placed exclusive jurisdiction over petitions for relief under section 1170.95 in the trial courts.

The Legislature intended to afford the People an opportunity to prove that defendants who were convicted of murder under a natural and probable consequences theory would nonetheless be guilty of murder had SB 1437 been in effect at the time of the conviction. Accepting A.V.'s argument would frustrate this purpose. Accordingly,

we conclude his only means for relief is by filing a section 1170.95 petition in the juvenile court.[6]

F. Testimony of Williams' Sisters

Williams contends the trial court prejudicially erred in excluding testimony of his sisters. Williams moved to present testimony from his sisters, and the prosecutor objected. Counsel claimed the evidence related to an argument in his opening statement giving the jury an alternative explanation for why Williams would carry a gun at the age of 16.

Counsel made the following offer of proof: Williams and his twin sister were born in Chowchilla. Their mother was a drug addict. His grandmother raised Williams and his sisters, but there was no father figure and there were many bad influences in Williams' life. Very little was provided for Williams at home; he was forced to turn to the dangerous streets to provide for himself. Williams sought out associations he could not find elsewhere, not to benefit a gang, but to fulfill a need for a social circle and support he could not find at home. Williams was poor when he was in middle school; lacking items other children had such as shoes or new clothes, he would steal them. This had no gang motive, he just didn't have things provided to him that other kids had. The sisters were unaware that Williams was involved with gangs.

Counsel argued the evidence was not submitted for sympathy or to bias the jury, but to show that his behavior did not necessarily benefit a gang. Rather than inviting speculation, the evidence would rebut the expert gang testimony, since the expert opined

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[6] Section 1170.95 places the venue for the petition in the court that sentenced the petitioner. Although " '[t]here is no "sentence," per se, in juvenile court, . . . a judge can impose a wide variety of rehabilitation alternatives after conducting a "dispositional hearing," which is equivalent to a sentencing hearing in a criminal court.' " (*Lara, supra*, 4 Cal.5th at p. 306.)

that everything Williams did was for the gang. Since the evidence went to motive, an expert was not necessary.

The trial court found the evidence would prejudice the prosecution by evoking sympathy for Williams' upbringing and circumstances. The evidence could have rebutted the prosecution's gang expert, but Williams was not offering his own gang expert opinion to rebut the prosecution expert. Since the evidence would be offered for the truth of the matter rather than as a basis for expert opinion, it would invite the jury to speculate. While Williams could testify to the reasons for his actions, allowing others to do so was too speculative. The trial court excluded the evidence pursuant to Evidence Code section 352 due to its speculative nature and prejudice to the prosecution.

Under Evidence Code section 352, "[t]he court in its discretion may exclude evidence if its probative value is substantially outweighed by the probability that its admission will (a) necessitate undue consumption of time or (b) create substantial danger of undue prejudice, of confusing the issues, or of misleading the jury." "Where, as here, a discretionary power is statutorily vested in the trial court, its exercise of that discretion 'must not be disturbed on appeal *except* on a showing that the court exercised its discretion in an arbitrary, capricious or patently absurd manner that resulted in a manifest miscarriage of justice.' " (*People v. Rodrigues* (1994) 8 Cal.4th 1060, 1124-1125.)

The offered evidence carried a risk of improperly invoking the jury's sympathies and emotions based on Williams' background. As the trial court found, the testimony also invited speculation as to the motive for the charged offenses, as none of the offered evidence addressed the direct reasons for those crimes. Exclusion was a proper exercise of the trial court's discretion. Since the evidence was properly excluded, Williams' due process claim fails as well. (See *People v. Harris* (2005) 37 Cal.4th 310, 336 ["the application of ordinary rules of evidence does not implicate the federal Constitution"].)

G. Williams' Enhancement for Use of a Firearm

The trial court reduced Williams' 25 years to life term for the section 12022.53, subdivision (d) firearm enhancement to 15 years to life in order to impose a term of 40 years to life. It did so because the court considered a 50 years to life term to violate the Eighth Amendment, as interpreted in *Miller v. Alabama* (2012) 567 U.S. 460 [183 L.Ed.2d 407] by being the equivalent of life without parole for a juvenile. The Attorney General appeals, contending this was an unauthorized sentence. We agree.

In response to the developing case law on juvenile sentencing, the Legislature passed Senate Bill No. 260 (2013-2014 Reg. Sess.) (SB 260), which became effective January 1, 2014. (Stats. 2013, ch. 312, § 4.) SB 260 added, among other provisions, section 3051. (*People v. Franklin* (2016) 63 Cal.4th 261, 276.) With certain exceptions not applicable here, section 3051 provides an opportunity for a juvenile offender to be released on parole irrespective of the sentence imposed by the trial court. Specifically, it requires the Board of Parole Hearings to conduct a "youth offender parole hearing" on a set schedule depending on the length of the prisoner's sentence. As relevant here, for a sentence of 25 years to life, the statute provides for a hearing no later than the 25th year of incarceration. (§ 3051, subd. (b)(3).)

The California Supreme Court subsequently held that section 3051's provision of a youthful offender parole hearing mooted the juvenile defendant's constitutional challenge to his sentence of 50 years to life by providing "a meaningful opportunity for release during his 25th year of incarceration." (*People v. Franklin, supra*, 63 Cal.4th at p. 280.) However, to ensure that the parole hearing provided the defendant with a meaningful opportunity for release, the court in *Franklin* remanded the case to the trial court for the limited purpose of determining "whether [the defendant] was afforded sufficient opportunity to make a record of information relevant to his eventual youth offender parole hearing." (*Id*. at p. 284.)

Section 3051, as applied in *Franklin*, moots the trial court's concerns.[7] Section 12022.53, subdivision (d) provides only for a 25 year to life term; the 15 years to life term imposed by the trial court is unauthorized. Since the trial court now has authority to strike the term, we shall vacate the unauthorized sentence rather than modify it to the authorized term.[8]

III. DISPOSITION

The gang enhancements as to both defendants are reversed for insufficient evidence.

A.V.'s sentence is vacated. We order his convictions and remaining enhancements to be deemed juvenile adjudications and remand the matter to juvenile court to consider any petition from A.V. to vacate his murder conviction pursuant to section 1170.95 and for disposition. At disposition, the juvenile court shall determine whether to exercise its discretion to strike the section 12022.53 enhancement.

The judgment of the criminal court in Williams' case is conditionally reversed. The cause is remanded to the juvenile court with directions to conduct a transfer hearing, no later than 90 days from the filing of the remittitur, as to each defendant. (Welf. & Inst.

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[7] Defendants presented considerable evidence regarding their youth and other mitigating factors at the sentencing hearing, including expert psychological testimony. Neither defendant asks for a remand under *Franklin* to present evidence relevant to a future parole suitability hearing.

[8] Williams contends *People v. Contreras* (2018) 4 Cal.5th 349 supports the trial court's action. The Supreme Court in *Contreras* held sentences of 50 years to life and 58 years to life for nonhomicide offenses committed by two 16-year-old defendants violated the Eighth Amendment (*id*. at p. 356), and directed the trial court on remand to consider "any mitigating circumstances of defendants' crimes and lives, and the impact of any new legislation and regulations on appropriate sentencing" (*id*. at p. 383). The 25-years to life term on the gun enhancement is part of a sentence for first degree murder, which distinguishes *Contreras*. Furthermore, since section 3051's youthful parole provisions apply to Williams' case, any Eighth Amendment claim is mooted. *Contreras* is inapplicable to this case.

Code, § 707, subd. (a); *Lara, supra*, 4 Cal.5th at pp. 310-313.) If, at the transfer hearing, the juvenile court determines it would have transferred Williams to a court of criminal jurisdiction, then the judgment and sentence for Williams shall be reinstated as of that date. If, at the transfer hearing, the juvenile court determines it would not have transferred Williams to a court of criminal jurisdiction, then his criminal convictions and enhancements will be deemed to be juvenile adjudications as of that date. The juvenile court is then directed to conduct a dispositional hearing within its usual time frame. At disposition, the juvenile court shall determine whether to exercise its discretion to strike the section 12022.53 enhancement.

If Williams' case is transferred to criminal court, then the trial court is directed to modify the 15 years to life term for the section 12022.53, subdivision (d) enhancement to 25 years to life, and to determine whether to exercise its discretion to strike any or all of the section 12022.53 enhancements.

/S/

RENNER, J.

We concur:

/S/

HULL, Acting P. J.

/S/

HOCH, J.